Before The

Federal Communications Commission

Washington, D.C. 20554

In re	)	
	)	
PMCM TV, L.L.C., Licensee of WJLP(TV)	)	File Nos.
Middletown Township, New Jersey	)	CSR – 8917-M
	)	CSR – 8918-M
v.	)	CSR – 8919-M
	)	
RCN Telecomm Services, LLC,	)	Docket No. 16-25
Service Electric Cable TV of New Jersey, Inc.,	)	Docket No. 16-26
Time Warner Cable Inc.	)	Docket No. 16-27
_____	)	

To: The Commission

OPPOSITION TO APPLICATION FOR REVIEW

Service Electric Cable Television of New Jersey, Inc. ("SECTV-NJ"), by its attorneys, and pursuant to Sections 1.115(d) rules, 47 C.F.R. Sec. 1.115(d), hereby files this Opposition to the Application For Review filed by PMCM TV, L.L.C. ("PMCM"), of the Media Bureau's Order, released May 17, 2016.[1] In support of this Opposition, SECTV-NJ submits:

I. QUESTIONS PRESENTED

PMCM submits the following issues to be decided by the Commission.[2]

A. Whether in delaying a decision on PMCM's June 6, 2014 demand for cable carriage until May 17, 2016, did the Commission violate the statutory requirement to act on cable carriage requests within 120 days.

[1] *PMCM TV, LLC v. Service Electric Cable TV of New Jersey, Inc.*, DA 16-548 (MB, released May 17, 2016) (the *Order*).

[2] SECTV-NJ paraphrases the Questions Presented on page 1 of the Application for Review in that some are overly verbose in their presentation, to the point of being confusing. Moreover, the rest of the Application for Review does not track the questions presented. Indeed, the first issue raised, of whether the Commission has timely acted upon the current channel positioning complaints, is relegated to the "Other Issues" section of the Application for Review, and is argued mainly in footnote 10. Section 1.115(b)(1) requires that an Application for Review "shall concisely and plainly state the questions presented for review with reference, where appropriate, to the findings of fact or conclusions of law," and the present Application for Review should be dismissed for failing to meet this standard.

B. Whether WJLP's channel positioning rights are determined by its transmission frequency or by its PSIP channel.

C. Whether the assignment of PSIP Channel 33 to WJLP violates the statutory prohibition against changing a station's "channel."

D. Whether the use of PSIPs to determine channel carriage rights eliminates all must-carry rights for stations.

E. Whether a station allocated under Section 331 is required to be carried on a cable channel between 2-13 (VHF) on cable systems.

II. Discussion

A. The Bureau Acted Promptly and Properly in Resolving the Channel Position Dispute in these Proceedings

The first issue raised in PMCM's Application for Review is whether the Commission has acted in accordance with Section 614(d)(3) in resolving the present channel positioning dispute.[3] PMCM claims that the full Commission should have resolved the channel positioning question within 120 days of WJLP notifying cable systems that it was about to go on the air on June 6, 2014.[4] There are at least three fundamental problems with this argument.

First, there was no "dispute" with any cable system as of June 6, 2014, because WJLP had not yet acquired any carriage rights, since it was not on the air as of June 6, 2014.[5] FCC rules require new television stations to make an election no earlier than 60 days prior to

[3] PMCM Application for Review, p. 13 & n. 10.

[4] *Id.* p. 1.

[5] PMCM claims that it has "used" Channel 3 as both its transmitting frequency and virtual channel for nearly five years. Application for Review, p. 2. The fact is, however, that for most of that five year period, WJLP was not operating, but was dark. Once it received authority to move its station across the country in 2012, the station remained dark until October 3, 2014. It has "used" Channel 3 as its transmitting frequency for just over a year and a half. WJLP never legally "used" PSIP Channel 3 in the New York market, but rather unilaterally adopted PSIP Channel 3.10 when it went on the air. On October 23, 2014, the Media Bureau assigned WJLP PSIP Channel 33.

commencing broadcasting and no later than 30 days after commencing broadcasting.[6] WJLP commenced broadcasting on or about October 3, 2014.[7] Its June 4, 2014, election letter was sent some 120 days prior to going on the air and is therefore beyond the window set forth in Section 76.64(f)(4) and therefore was not a valid election. The ridiculous nature of PMCM's reading of Section 614(d)(3) is highlighted by the fact that if it is correct, then the full Commission would have had to rule on WJLP's channel positioning rights on SECTV-NJ's system ***the day after WJLP went on the air.*** Section 76.64(f)(4) makes clear that the earliest a station can acquire carriage rights is thirty days after it has gone on the air.[8]

Second, Section 614(d)(3) states that the Commission shall resolve carriage disputes within 120 days "after the date ***a complaint*** is filed."[9] PMCM filed the complaints on January 19, 2016. The Bureau issued its order on May 17, 2016, within 120 days of the complaint being filed. Finally, PMCM's argument that the 120 day clock is only satisfied if the ***full*** Commission issues a decision is contrary to the structure of the FCC and is equally nonsensical. The FCC has delegated to the Media Bureau the authority to resolve carriage disputes under Sections 0.61 and 0.238 of its rules.[10] It would be virtually impossible for the full Commission to issue an order within 120 days after a complaint is filed, and then acted upon by the Bureau under delegated

[6] 47 C.F.R. § 76.64(f)(4). The term "complaint" in Section 614(d)(3) must have the same meaning as is contained in Sections 76.7 and 76.61 of the Commission's rules. PMCM's complaint, in fact, invokes those sections as the basis of the filing. The clock started running on January 20, 2016, and stopped when the Bureau issued its orders on May 17, 2016, less than 120 days later.

[7] *See* PMCM *ex parte* submission in Docket 14-150, dated February 2, 2016, p. 4.

[8] *See* 47 C.F.R. § 76.64(f)(4) (new station can make a must-carry election no earlier than 60 days prior to going on the air, and such election becomes effective 90 after made; 90 – 60 = 30 days).

[9] 47 U.S.C. § 532(d)(3) (emphasis added).

[10] 47 C.F.R. § 0.61 and 0.238.

authority.[11] Under PMCM's interpretation of Section 614(d)(3), together, the Bureau and the full Commission would have only 35 days (or roughly 27 business days) to review the pleadings and write two orders, or 13.5 business days at each level. PMCM points to no legislative history indicating that Congress intended such an incredibly "fast track" for must-carry complaints.[12]

B. The Bureau Properly Concluded that WJLP's Channel Positioning Rights are Based on its PSIP and not its Transmission Frequency

PMCM's argument that the term "channel" within Section 614(b)(6) must be its transmission frequency (Channel 3/ 60-66 MHz)[13] is wrong as a matter of law and decades of Commission precedent. First, the term "channel" has many meanings in the English language.[14] Within Section 614 itself, the word "channel" is used 22 times and has multiple meanings. In Sections 614(b)(1)(A)&(B), for example, the term "channel" is used to refer to the number of different programming streams transmitted by a cable system, not the transmission frequencies

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[11] The pleading schedule established in the Commission rules belies this argument. The following time periods apply:

> 20 days after service to file an opposition (§ 76.7(b)(ii)) ;
> 10 days to file a reply (§ 76.7(c)(iii));
> 30 days to file and application for review after the Bureau issues an order (§1.115(d));
> 15 days to file an opposition to an application for review (*id.*);
> 10 days to file a reply to an opposition (*id.*).
> 85 days built into the rules for pleading schedules.

Were PMCM's reading of Section 614(d)(3) correct, the Commission would have no choice but to decide all must-carry and channel positioning disputes in the first instance and scrap the delegated authority structure which has existed for generations. Such an approach to adjudicating must-carry disputes would be highly disruptive to the overall work of the Commission, and would essentially pole vault cable carriage disputes into the most important and pressing business of the FCC.

[12] PMCM also ignores the fact that had it prevailed before the Bureau, SECTV-NJ would have been compelled to begin carrying WJLP, even if SECTV-NJ filed an application for review. It is only because WJLP did not prevail at the Bureau level that it hasn't gained the relief it is looking for within 120 days. Given that PMCM's arguments overall have no merit, this doesn't represent a violation of Section 614(d)(3).

[13] Application for Review, p 6.

[14] *See, e.g.*, Webster's online dictionary at http://www.websters-online-dictionary.org/ has 14 primary definitions for "channel", ranging from electrical pathways to nautical terms such as a creek or the "deeper part of a river."

(over wire) of these programming streams.[15] Even within Section 614(b)(6), the word "channel" has multiple meanings within the sentence.[16] If, as PMCM wants, the term "channel" is changed to "transmission frequency," then Section 614(b)(6) would require cable systems to transmit a local television stations on its transmission frequency, and in this case require cable systems to transmit WJLP over its cable plant on 60-66 MHz.[17] This makes absolutely no sense, as digital cable systems long ago left behind the notion of 6 MHz of analog spectrum dedicated to each programming stream.

Congress recognized as early as 1992 when Section 614 was passed that the change from analog TV transmission to digital TV transmission would require the FCC to adopt future carriage rules that were consistent with, but cognizant of, the digital revolution.

> At such time as the Commission prescribes modifications of the standards for television broadcast signals, the Commission shall initiate a proceeding to establish any changes in the signal carriage requirements of cable television systems necessary to ensure cable carriage of such broadcast signals of local

[15] 47 U.S.C. § 534(b)(1)(A) ("A cable operator of a cable system with 12 or fewer usable activated channels shall carry the signals of at least three local commercial television stations"); § 534(b)(1)(B) ("A cable operator of a cable system with more than 12 usable activated channels shall carry the signals of local commercial television stations, up to one-third of the aggregate number of usable activated channels of such system.")

[16] 47 U.S.C. § 534(b)(6), referring to both cable channels and television channels. PMCM hangs its argument on the language of Section 614(b)(6) that it has carriage rights on the "channel on which the local commercial television station is broadcast over the air." Application for Review, p. 5. The fact is that WJLP's PSIP Channel 33 ***is*** **"**broadcast over the air" as part of the PSIP protocol. That's the main purpose of the PSIP standard – to allow television sets to remap the transmission frequency to the station's virtual channel, and the channel on which it has carriage rights.

[17] Section 614(b)(6) would thus read: "Each signal carried in fulfillment of the carriage obligations of a cable operator under this section shall be carried on the cable system transmission frequency on which the local commercial television station is broadcast over the air, or on the transmission frequency on which it was carried on July 19, 1985, or on the transmission frequency on which it was carried on January 1, 1992, at the election of the station, or on such other transmission frequency as is mutually agreed upon by the station and the cable operator." Such a reading would essentially require cable systems to reengineer their systems to the way they were done back in 1985 to accommodate a demand for transmission on the frequencies used to transmit the station in 1985.

> commercial television stations which have been changed to conform with such modified standards.[18]

The Commission did just this is a series of orders beginning in 1993 through 2008. In 1995 the FCC asked the question: "Does 'on-channel' carriage have the same meaning in a digital as it does in an analog environment?"[19] Both the television and cable industries responded in accordance with the Administrative Procedures Act (APA). In 1995 the Commission answered the question as to whether cable systems could re-map their systems as they went digital.

> Under the PSIP protocol, stations that were operating on analog channels in 2004, when 73.682(d) was adopted, and were likely being viewed on cable on their analog channel numbers, were eligible to continue to be viewed on cable on that same channel number when they transitioned to digital-only on a different digital RF channel, thus allowing those stations to maintain their local brand identification.[20]

Finally, in 2008, the Commission answered the question as to channel positioning rights of digital television stations on cable systems, after receiving further comments under the APA.

> [i]n digital broadcasting, a broadcast station's channel number is no longer identified by reference to its over-the-air radio frequency. Instead, in compliance with the ATSC standard, the station's 'major channel number' is identified in its [PSIP].[21]

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[18] 47 U.S.C. § 534(b)(4)(B). PMCM's argues that because this provision was placed under the category "Signal Quality," that the FCC's ability to accommodate the reengineering of television was limited to issues related to material degradation on cable systems. Application for Review, pp. 8-9. That reading is untenable. Section 614 does not represent a patchwork statutory provision that was cobbled together over time and multiple amendments by Congress, and thus subject to such a "stovepipe" analysis. Rather, Section 614 was a single comprehensive statutory regime the provisions of which must be read together. Concluding that the Commission's ability to modify its carriage rules to accommodate the digital transition would require the Commission now, 24 years after the 1992 Cable Act, to go back and start completely over to change only those carriage rules that deal with signal degradation and leave all other carriage rules alone, totally breaking the must-carry regime.

[19] *Advanced Television Sys. & Their Impact Upon the Existing Television Broad. Serv., Fourth Further Notice of Proposed Rule Making and Third Notice of Inquiry*, 10 FCC Rcd 10540, 10553 (1995).

[20] *Second Periodic Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television, Report and Order*, 19 FCC Rcd 18279, 18344-6, paras. 149-53 (2004).

[21] *Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission's Rules, Declaratory Order*, 23 FCC Rcd 14254, 14259, para. 16 (2008) (*2008 Declaratory Order*).

The Media Bureau has followed this standard in a number of decisions rendered since 2008.[22] Now, 24 years after the 1992 Cable Act was passed, PMCM wants to chuck the careful balance struck by the Commission and uniformly applied by the Bureau because it has decided that it would be in its business interest to be able to market itself over the air as "Channel 3" and translate that into carriage on cable systems "Channel 3."[23] PMCM's attempt to contort the statutory language into a pretzel to accomplish its ends should not override almost a quarter century of good and settled regulatory law.

C. Assigning WJLP PSIP Channel 33 does not Violate the Spectrum Act

PMCM next argues that assigning WJLP PSIP Channel 33 violates the Spectrum Act's prohibition on changing a station's "channel" until after the auction.[24] As the Bureau noted in its Order, such an argument is the subject of PMCM's appeal in Docket 14-150, and has little, if anything, to do with the current must-carry complaint.[25] Moreover, this argument requires PMCM to now stand on its head and reverse itself to define "television channel" as a station's PSIP.[26] As stated above, the term "channel" is prone to multiple meanings, and must be read within the over construct of the statute. For the Spectrum Act, "television channel" clearly means the transmission frequency. That term is used 23 times in the statute. Replacing

[22] *See, e.g., KSQA, L.L.C. v. Cox Cable Communications, Inc., Memorandum Opinion and Order*, 27 FCC Rcd 13185, 13187, para. 4 (MB Policy Div. 2012); *Gray Television Licensee, LLC v. Zito Media, L.P., Memorandum Opinion and Order*, 28 FCC Rcd 10780, 10781 n.10 (MB Policy Div. 2013).

[23] The actual value of being carried on cable channel 3 is problematic at best. On the SECTV-NJ system, for example, the high definition programming of New York television stations are carried on channels 502-517. That is where the majority of viewing is done on the system. Placing WJLP on channel 3 on the system would displace the standard definition Home Shopping Network programming, and WJLP would be surrounded by standard definition programming. Many other area cable systems are similarly engineered such that HD television programming is on a higher numbered tier.

[24] Application for Review, p. 10.

[25] *Order*, ¶ 7, n. 37.

[26] Application for Review, p. 11.

"television channel" with "PSIP," as PMCM would now have the Commission due, would lead to totally absurd results such as a station being required to relinquish rights to its PSIP for compensation (but not the rights to transmit on a frequency),[27] a station would give up its right to transmit on a relinquished frequency, and instead would share a PSIP with another station (but with no right to transmit over that station's frequencies,[28] and direct the FCC to reorganize PSIPs, but not the underlying spectrum.[29] Statutes are not to be read to create absurd results.[30]

Similarly nonsensical is PMCM's argument that the FCC created a fifth statutory choice for channel placement, adding a station's PSIP in addition to a station's transmission frequency.[31] The four channel position choices are statutory and can't be added to by Commission fiat. Contrary to PMCM's claim,[32] the Commission's use of the term "may demand carriage on its major channel number" did not indicate an attempt to unlawfully expand the channel positioning rights of stations, but rather was merely pointing out that a station ***may*** choose its major channel number (PSIP) as one of the four options available to it under Section 614(b)(6). The Bureau got this right in the *Order*,[33] and the Commission should affirm.

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[27] *See* 47 U.S.C. § 1452(a).

[28] *Id.* at § 1452(a)(4).

[29] *Id.* at § 1452(b).

[30] *United States v. Kirby* , 74 U.S. 482 (1868). PMCM argues that Section 1452(g)(1)(A) must be read in such a way that "television channel" means "PSIP," because otherwise the language becomes surplusage. Application for Review, p. 11. Quite the opposite is true, however. That subsection contains two prohibitions: 1) altering the spectrum usage rights; and 2) altering the transmission frequency of a station until after the Incentive Auction is over. "Spectrum usage rights" include a myriad of conditions, such as transmission power, tower location, frequency offset, etc. That Congress chose to augment that term to call out transmit frequency number merely highlights the prohibition on that particular spectrum usage right.

[31] Application for Review, p. 8.

[32] *Id.* at n. 7.

[33] *Order*, ¶ 7.

D. Using PSIPs to Determine Channel Positioning Rights Does Not Eviscerate the Must-Carry Rights of All Stations

PMCM next makes the claim that by adopting the use of PSIP channels to determine channel position rights in 2008, the FCC somehow destroyed all must-carry rights for all stations.[34] If that were the case then there would have to be instances in which cable systems have refused carriage based on this argument. PMCM points to no such instances. Instead, it is clear that a station that operates on a frequency allocated to the market is entitled to carriage.[35] What its channel positioning rights are, however, are determined by its PSIP, not the Part 73 Table of Allotments.

E. PMCM's Argument that it is Entitled to a VHF PSIP Under Section 331 is Unripe and Should Be Dismissed

Finally PMCM raises for the first time in its Application for Review an argument that Section 331 of the Act entitles it to a VHF PSIP and carriage on a VHF channel on cable systems.[36] Applications for review must not present issues to the Commission that were not presented to the Bureau below.[37]

If the Commission does take up this argument, it should reject it out of hand. PMCM claims that it was the intent of Congress to give to each state "an identifiable VHF dial position," but points to no legislative history to support this claim.[38] Indeed, the opposite is true. Section 331 was adopted because in the analog age of broadcasting, the reach of stations transmitting on

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[34] Application for Review, p. 9.

[35] 47 U.S.C. § 534(h)(1)(A).

[36] Application for Review, p. 4.

[37] 47 C.F.R. § 1.115(c) ("No application for review will be granted if it relies on questions of fact or law upon which the designated authority has been afforded no opportunity to pass"). *See Christian Family Network, Inc.* FCC 16-36 (released March 30, 2016), *BDPCS, Inc. v. FCC*, 351 F.3d 1177, 1184 (D.C. Cir. 2003) (Section 1.115(c) does not allow the Commission to grant an application for review if it relies upon arguments that were not presented below).

[38] Application for Review, p. 4.

VHF frequencies far surpassed that of UHF stations. The Court of Appeals decision that forced the FCC to allow PMCM to move a station across the country recognized this, and the fact that Section 331 was adopted with virtually no legislative history to show Congressional intent.[39] Section 331 had everything to do with the physics of wave propagation, and nothing to do with some hypothetical business advantage that would be gained by a station branding itself with a one or low two-digit dial position.

WHEREFORE, for the reasons set forth in this Opposition, SECTV-TV requests that the Commission deny PMCM's Application for Review.

Respectfully submitted,

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[39] *PMCM TV, LLC v. FCC*, 701 F.3d 380, 381 (D.C. Cir. 2012) ("For most of broadcast television's history, VHF channels have enjoyed substantial technical advantages over other broadcasting methods"); *id.* at 383 ("Our task is to determine how section 331(a) applies to a situation not contemplated by Congress. Although this is hardly an unusual undertaking for this Court, it is unusually challenging here because Congress held no hearings on section 331(a), passed it as a rider to an unrelated tax bill, and used language we have found cannot be interpreted," *citing Multi-State Communications*, 728 F.2d 1519, 1522-24 (D.C. Cir. 1984)).

CERTIFICATE OF SERVICE

I, James E. Dunstan, hereby certify that on this 27th day of June, 2016, I caused copies of the foregoing "Opposition to Consolidated Application for Review" to be placed in the U.S. Postal Service, first class postage prepaid, or hand-delivered (as indicated below) addressed to the following persons:

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